Wahi bin Saidin & Ors v Yang Dipertua Majlis Perbandaran Kulim & Ors

HIGH COURT (ALOR SETAR) — APPLICATION FOR JUDICIAL REVIEW NO 25NCVC-34–7 OF 2012
SEE MEE CHUN JC
23 SEPTEMBER 2012

Administrative Law — Judicial review — Application for — Leave stage — Review of planning approval for construction of Chinese cemetery — Application by owners of neighbouring land for leave to intervene at leave stage — Whether applicants had direct interest to intervene in judicial review proceedings

Planning approval and approval for the construction of a Chinese cemetery (Memorial Park) had been granted and change in land use from agriculture to *perkuburan komersial* approved in relation to Lot 483 Grant 9680 ('the land'). The applicants, beneficial owners of the neighbouring land, applied for mandamus and certiorari against the respondents to revoke the planning approval and change of land use. At the leave stage, Damai Hikmat Sdn Bhd (Damai) which was the registered proprietor of the land sought to intervene to be added as the fourth respondent. The applicants contended that Damai not being involved in the decision making process of the respondents and could not possibly be involved, thereby rendering it not necessary for it to intervene.

Held, allowing the application to intervene:

(1) Applying the test of 'direct interest', Damai would be directly affected by the outcome of the judicial review proceedings as it was the registered proprietor of the land and the developer of the cemetery; *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307 referred (see para 9).

(2) The application to intervene can be made at the leave stage; *Advance Synergy Capital Sdn Bhd (formerly known as Advance Synergy Capital Bhd) v The Minister of Finance, Malaysia & Anor* [2011] 6 MLJ 376 referred (see para 10).

(3) As Damai had a direct interest in the judicial review proceedings leave was ought to be granted for it to intervene despite it being at the leave stage (see para 11).

[Bahasa Malaysia summary

Kelulusan perancangan dan kelulusan untuk pembinaan perkuburan Cina (Taman Peringatan) telah diberikan dan pertukaran penggunaan tanah

daripada pertanian kepada perkuburan komersial diluluskan berkaitan Lot 483 Geran 9680 ('tanah'). Pemohon-pemohon, pemilik-pemilik benefisiari tanah bersebelahan, memohon untuk mandamus dan certiorari terhadap responden-responden untuk membatalkan kelulusan perancangan dan pertukaran penggunaan tanah. Pada masa peringkat izin, Damai Hikmat Sdn Bhd ('Damai') yang mana adalah pemilik berdaftar tanah tersebut memohon untuk mencelah untuk dimasukkan sebagai responden keempat. Pemohon-pemohon berhujah bahawa Damai tidak terlibat dalam proses membuat keputusan responden-responden dan tidak mungkin akan terlibat, dengan itu menyebabkan tidak perlu untuknya mencelah.

Diputuskan, membenarkan permohonan untuk mencelah:

(1) Mengguna pakai ujian 'direct interest', Damai akan terus terjejas dengan keputusan prosiding semakan kehakiman memandangkan ia adalah pemilik berdaftar tanah tersebut dan pemaju tanah perkuburan tersebut; *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307 dirujuk (lihat perenggan 9).

(2) Permohonan untuk mencelah boleh dibuat di peringkat izin; *Advance Synergy Capital Sdn Bhd (formerly known as Advance Synergy Capital Bhd) v The Minister of Finance, Malaysia & Anor* [2011] 6 MLJ 376 dirujuk (lihat perenggan 10).

(3) Memandangkan Damai mempunyai kepentingan terus dalam prosiding semakan kehakiman izin patut diberikan untuk ia mencelah meskipun ianya pada peringkat izin (lihat perenggan 11).]

Notes

For cases on application for, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 278–320.

Cases referred to

Advance Synergy Capital Sdn Bhd (formerly known as Advance Synergy Capital Bhd) v The Minister of Finance, Malaysia & Anor [2012] 6 MLJ 376; [2011] 7 CLJ 557, CA (refd)

Majlis Agama Islam Selangor v Bong Boon Chuen & Ors [2009] 6 MLJ 307; [2009] 6 CLJ 405, FC (refd)

Legislation referred to

Rules of Court 2012 O 53 r 8(1)
Rules of the High Court 1980 O 15 r 6(2)(b)(i)

Muhammad Nizamuddin Abdul Hamid (Nizamuddin Hamid & Co) for the applicants.
SL Tan (Toh Theam Hock & Co) for the respondents.

See Mee Chun JC:

[1] Enclosure (1) is the application for mandamus and certiorari against first to third respondents. At the leave stage, by encl (23) Damai Hikmat Sdn Bhd ('Damai') seeks to intervene to be added as the fourth respondent.

[2] In its affidavit in support in encl (24) Damai states it is the registered proprietor of Lot 483 Grant 9680 ('the land') for which planning approval and approval for the construction of a Chinese cemetery (memorial park) had been granted and change in land use from agriculture to *perkuburan komersial* approved. The application in encl (1), inter alia, seeks to compel R1 to revoke the planning approval and for R3 to revoke the change of land use. The applicants are beneficial owners of neighbouring land (*bersempadan*).

[3] The application to intervene was resisted on the authority of the Federal Court decision in *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307; [2009] 6 CLJ 405 where the passage sought to be relied on at pp 318(MLJ); 416(CLJ) states:

> …The proceedings before the High Court at Shah Alam are aimed at reviewing the decisions of MBSA. The appellant was not involved in these decisions nor can it, at this stage, claim that it ought to have been involved. It is to be noted in judicial review proceedings, the court in exercising its supervisory jurisdiction would only be concerned with the decision making process and not the decision itself ….

[4] On this score alone the applicant contended Damai not being involved in the decision making process of the respondents and could not possibly be involved, thereby rendering it not necessary for it to intervene.

[5] However, the quoted passage has to be read in its context where after answering the Question 'whether O 15 r 6(2)(b) of the RHC 1980 applies to an application for intervention in judicial review proceedings' in the negative, the court nevertheless proceeded to answer Question 2. It is stated at pp 415–416:

> Notwithstanding that Question 1 has been answered in the negative I would proceed to answer Question 2. It is my view that the appellant does not have an interest in any event, either to satisfy O 15 r 6(2)(b) of the RHC or even O 53 r 8(1) of the RHC. Question 2 must be answered in the negative as well.
>
> It is necessary that we first ascertain whether on the facts available the intervener application of the appellant has itself satisfied the requirements of O 15 r 6(2)(b) ofthe RHC …

> Under O 15 r 6(2)(b) of the RHC, the proposed intervener must establish under limb (i) that he ought to have been joined as a party or his presence before he court is necessary to ensure that all matters in dispute may be effectually and completely determined and adjudicate upon …
>
> Based on the provisions of O 15 r 6(2)(b) of the RHC it is my considered view there is no necessity for the appellant to be joined as a party.

[6] Hence the statement the proposed intervener must be involved in the decision making process was in the context of O 15 r 6(2)(b)(i). I am fortified in this when looking at the facts of that case as narrated at p 411:

> By an order dated 17 August 2006 given by the Shah Alam High Court, the respondents 1–147, who are owners of residential units in Kota Kemuning and Kemuning Greenville, Shah Alam ('the housing estate') were given leave under O 53 r 3 of the Rules of the High Court 1980 ('RHC') to apply for judicial review of the decisions of the respondent 148, that is Majlis Bandaraya Shah Alam ('MBSA') dated 19 April 2006 and 14 May 2006 respectively. MBSA under its planning laws had decided to allocate an approximately 13.84 acres of land in the housing estate as a Muslim burial ground ('the burial ground'). The respondent 149, Hicom Gamuda Development Sdn Bhd ('Gamuda') is the developer for the housing project in the said housing estate. Gamuda is named as party by respondent 1–147 with a prayer for a claim of damages against it. The respondents 150–151 are Muslim individuals who are also residing in the housing estate. They were allowed by the Shah Alam High Court to intervene in the judicial review proceedings on behalf of themselves as well as other 632 Muslim residents in the housing estate.

From the facts of that case the residents of the housing estate were allowed to intervene. They could not possibly have been involved in the decision making process of MBSA.

[7] Further, to impose the requirement that the proposed intervener must be involved in the decision making process would negate O 53 r 8(1) of the Rules of Court 2012. It provides:

> 8. (1) Upon the hearing of an application for judicial review, any person who desires to be heard in opposition to the application and appears to the Judge to be a proper person to be heard may be heard notwithstanding that he has not been served with the cause papers in the matter.

[8] The correct test would therefore be at pp 319 (MLJ), 418 (CLJ) of *Majlis Agama Islam Selangor* where the court states:

> I am of the view the use of the phrase 'proper person' in O 53 r 8(1) of the RHC must be read as referring to persons with a direct interest …

[9] Applying the test of 'direct interest' it is my finding Damai would be

directly affected by the outcome of the judicial review proceedings. It is the registered proprietor of the land and the developer of the cemetery.

[10] As to the application to intervene being made at the leave stage *Advance Synergy Capital Sdn Bhd (formerly known as Advance Synergy Capital Bhd) v The Minister of Finance, Malaysia & Anor* [2012] 6 MLJ 376; [2011] 7 CLJ 557 makes it clear this can be so. In this regard it is stated at pp 385 (MLJ), 569 (CLJ):

> First of all, it is noteworthy that O 53 is captioned 'application for judicial review'. The word 'application' in this caption would cumulatively cover the two stages ie, the leave application at the threshold stage as well as the substantive stage after leave has been granted. Similarly, the expression 'an application for judicial review' in O 53 r 8(1)–(2) would also include the two stages which are the essential characteristics prevailing in an application for judicial review … There is no plausible reason to exclude a proper party or person to be granted leave to intervene as a respondent at the leave stage. In such circumstances, inclusivity rather than exclusivity should be the norm, so as to ensure fairness to the party who has a direct interest in the matter.

[11] As Damai had a direct interest in the judicial review proceedings leave ought to be granted for it to intervene despite it being at the leave stage. Enclosure (23) was allowed.

Application to intervene allowed.

Reported by Kanesh Sundrum